Testimony of

Ms. Coralie Wilson

President
National Association of Telecommunications Officers and Advisors
February 11, 2004

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMPETITION
AND BUSINESS AND CONSUMER RIGHTS

HEARING ON

"CABLE COMPETITION - INCREASING PRICE; INCREASING VALUE?"

FEBRUARY 11, 2004

DIRKSEN S-226

TESTIMONY OF

THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS

BY

CORALIE WILSON

PRESIDENT, NATOA BOARD OF DIRECTORS

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OF TELECOMMUNICATIONS
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Chairman DeWine and Members of this Committee:

I am Coralie Wilson, President of the Board of Directors of the National Association of Telecommunications Officers and Advisors. NATOA is a national organization that represents the cable, telecommunications and related interests of local governments across the United States. We are grateful for the opportunity to share our views and suggestions on the important issues before you today.

The FCC has repeatedly found that head-to-head competition between terrestrial facilities-based providers of video programming results in significantly lower rates, more channels and better service for consumers. The General Accounting Office recently estimated that the rate differential is approximately 15 percent nationwide. Local governments therefore have a strong interest in promoting robust cable competition

In the late 1990s, competition began to emerge in many communities across the United States. In many cases, however, incumbents sought to thwart local governments from awarding competitive franchises, and in others we began to see incumbents engaging in a variety of anticompetitive practices.

By 2002, the number of overbuilds declined dramatically. Although the economy was clearly a factor, the feedback that NATOA was receiving from its members suggested that the anticompetitive activities of incumbents were also contributing to this phenomenon. As a result, NATOA commissioned a study of the kinds of anticompetitive practices that were occurring and the steps that may be necessary to deal with this problem.

In March 2003, the Baller Herbst Law Group submitted its extensive report and recommendations to NATOA, a copy of which is attached, with privileged attorney-client material removed. As you will see, it contained dozens of examples of anticompetitive behavior. The report cautioned that, given the nature of the data-collection process, some of the information presented might not be completely accurate or current and that it had not been subjected to detailed analysis. The report concluded, however, that the sheer volume of the information available indicated that anticompetitive practices by incumbent cable operators warranted further investigation. In presenting the report to you, we underscore its reservations and add a further qualification that the facts and cases cited are now nearly a year old.

Recent FCC decisions and orders have reflected increasing concern about anticompetitive practices by the major incumbent cable operators, but the agency believes that it lacks statutory authority to do anything about this problem. To this end we believe that two statutory changes, while not the entire solution, would be very helpful.

First, several major incumbent cable operators are practicing targeted rate discrimination through what they call "win-back" programs. A common and critical feature is that the incumbent does not offer its own subscribers the same special deals that it offers to subscribers who have transferred, or are threatening to transfer, their business to an overbuilder.

It was precisely for this reason that Congress enacted in 1992 a uniform rate requirement in Section 623(d) of the Communications Act. As Congress stated, the purpose of Section 623(d) was "to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."

In the Telecommunications Act of 1996, believing that true competition in the cable industry was imminent, Congress subjected the uniform rate requirement to an important qualification - it would no longer be applicable if there was "effective competition" in the relevant market. At times, incumbent operators have successfully defeated a claim of anticompetitive practices simply by filing a claim for effective competition with the FCC. Since claims of effective competition based on direct broadcast satellite offerings are based on data not generally available to the local government and requires a response in 20 days, they are very difficult to defeat Hence, the use of effective competition claims to defeat allegations of anticompetitive practices is very effective. Congress should recognize this and delete the "effective competition" exception from Section 623(d).

Second, Sections 628(c)(2)(C) and (D) of the Communications Act prohibit vertically integrated cable operators and programming vendors from entering into, or renewing, exclusive contracts under most circumstances. Unfortunately, the FCC has repeatedly found that these provisions apply only to video programming delivered by satellites, and not to programming delivered terrestrially through fiber optic cable. As the FCC has itself recognized, this construction of the law adversely affects the ability of overbuilders to obtain critical programming, especially regional sports programming, and it gives incumbents the incentive to shift programming from satellite to terrestrial delivery as horizontal growth and "clustering" in the cable industry enhances the ability of incumbents to deliver video programming terrestrially among adjoining cable systems. NATOA recommends that Congress eliminate the terrestrial delivery loophole.

Furthermore, given the efforts of major cable incumbents to tie up content of all kinds, not merely video programming, in exclusive contracts, Congress may also want to extend the ban on exclusive contracts to include content of all kinds.

We appreciate this opportunity to testify and would be glad to answer any questions or provide any further information that the Committee or its staff may desire.

Thank you.

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REPORT ON

ANTICOMPETITIVE PRACTICES BY INCUMBENT CABLE OPERATORS

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February 2004

Introduction by NATOA: This report was originally prepared at the request of the National Association of Telecommunications Officers and Advisors' Board of Directors. The report was presented to the Board of Directors in March 2003. The report has been used to supplement our understanding of some obstacles to meaningful competition in our communities, and to better ascertain whether there are actions that may be taken by local government to enhance the ability of competition to take hold and flourish. Some portions of the report relating to advice or strategy have been removed prior to its distribution beyond the leadership of the Board. While NATOA has agreed to make the content of the analysis available for further consideration, NATOA specifically cautions the reader that examples contained in the report that imply anticompetitive behavior are the result of media reports, direct member or local government reports or public information. Incumbent providers have not been asked by NATOA to specifically respond to such allegations. Except as indicated herein, examples have not been further tested, verified or otherwise subjected to scrutiny by NATOA. Further, the reader is encouraged to verify accuracy of any information which may have changed as a result of the passage of time.

OVERVIEW

In recent months, the Federal Communications Commission ("Commission" or "FCC") has expressed increasing alarm about anticompetitive behavior by some of the nation's largest cable operators. To date, however, the Commission has not taken any concrete steps to address this issue. To the contrary, and perhaps unintentionally, the Commission has issued a number of piecemeal decisions and orders that have exacerbated the problem.

At the request of NATOA's Board of Directors, the Baller Herbst Law Group has gathered a substantial amount of information about the anticompetitive practices of the major multi-system operators (MSOs). We obtained much of this information from members of NATOA, the American Public Power Association (APPA), and the Broadband Service Providers Association (BSPA). We also reviewed pleadings and rulings in cases before the FCC, the DOJ, the Federal Trade Commission (FTC) and the courts; federal and state agency reports; law review articles; legal treatises; newspapers and magazines; and various other sources.

Our research focused on predatory pricing, rate discrimination, denial of access to programming, exclusion of competitors from multiple dwelling units (MDUs), threats not to do business with contractors and suppliers that wanted to serve new competitors, and an assortment of other unfair business practices. Our research confirmed that anticompetitive behavior by the major MSOs is a significant and growing threat to competition in the cable industry.

ANALYSIS

In Section I below, we begin with an overview of the undisputed fact that healthy competition in the cable industry furthers the public interest. In Section II we discuss the specific anticompetitive practices of cable MSOs.

I. THE BENEFITS OF COMPETITION

According to the FCC, there are a total of 9,667 cable systems in the United States, and of these, only 64 faced competition from public or private overbuilders as of November 2002. Where overbuilds have occurred, they have greatly benefited consumers. According to the FCC, "[a]vailable evidence indicates that when an incumbent cable operator faces 'effective competition,' as defined by the Communications Act, it responds in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer service and adding new services such as interactive programming."

More specifically, in each of its last two reports on cable pricing, the FCC has found that consumers in competitive markets pay cable rates that average 6.3 percent lower than cable rates in non-competitive markets. In fact, this so-called "competitive differential" is likely to be significantly higher than 6.3 percent because, as discussed more fully below, the FCC's flawed definition of "effective competition" results in the inclusion of rate differentials from many markets in which no meaningful competition exists.

The average system capacity of incumbent cable systems is 14 MHz greater in competitive markets than in non-competitive markets. Ninth Annual Video Competition Report at 24, Table 3. Incumbents in competitive markets are 5.2 percent more likely than incumbents in non-competitive markets to have upgraded their systems to 750 MHz or higher. Id. Similarly, the average number of channels in competitive markets is greater than in non-competitive markets (83.3 to 81.7). Id.

Furthermore, the FCC has also found that incumbent cable operators are more price- sensitive to competition from wireline overbuilders than they are to satellite competitors:

In those areas where a cable operator faces effective competition from a wireline overbuilder (i.e., where a finding of effective competition was based on the [Local Exchange Carrier] LEC test or the wireline portion of the overbuild test), we found that operators tend to offer more channels at a lower rate. In the few areas where the Commission has made a finding of effective competition as a result of [Direct Broadcast Satellite] DBS penetration, we found that the presence of DBS competition had no statistically significant effect on the demand for cable service or on cable rates.

Healthy competition in the cable industry undisputedly furthers the public interest. Several of the large MSOs, however, are less than keen on it. They possess both the ability and the natural inclination to eliminate nascent competition, and, as discussed in the following section, they have employed a variety of anticompetitive tactics to do so.

II. ANTICOMPETITIVE PRACTICES OF MSOs

When faced with competition from overbuilders, several of the largest incumbent cable operators have resorted to anticompetitive practices of various kinds. In this section, we discuss the major categories of anticompetitive behavior that our research has disclosed - predatory pricing, rate discrimination, denial of access to programming, unfair conduct concerning access to MDUs, and other unfair competitive practices.

A. Predatory Pricing

1. Predatory pricing under the federal antitrust laws

a. The Sherman Act

Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, provides that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Predatory pricing is one of the many ways in which a would-be monopolist can violate Section 2 of the Sherman Act. As the FCC has observed, "[p]redatory pricing involves 'deliberately pricing below cost to drive out rivals and raising the price to the monopoly level after their exit.' Thus, the offense of predatory pricing has two elements: a pricing element and a subsequent recoupment element." Panamsat v. Comcast, 12 FCC Rcd 6952, FCC 97-172 (released May 20, 1997), quoting Price Cap Performance Review for Local Exchange Carriers, 11 FCC Rcd 858, 870-871 (1995).

In Brooke Group Ltd v. Brown & Williamson Tobacco Corporation, 509 U.S. 209 (1993), the United States Supreme Court said of the pricing element that "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. ... [O]nly below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." Id. at 223 (citations omitted).

In the course of spelling out how it would determine whether discounts to multiple dwelling units (MDUs) were predatory, the FCC noted that it was required to apply the teaching of Brooke Group. With regard to the below-cost pricing element, the FCC said that "we will consider whether a cable operator's price to an MDU recovers at least the incremental costs of serving that MDU, including any new costs from constructing or upgrading its physical facilities in order to offer the bulk service agreed to with the building's owner or manager, and whether the cable operator has a reasonable prospect of recouping its investment in below cost prices in the MDU."

The recoupment element, the Supreme Court continued in Brooke Group, is satisfied when the following conditions are met:

For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.

If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, "[i]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices."

Evidence of below-cost pricing is not, alone, sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed.

In certain situations - for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity - summary disposition of the case is appropriate.

Brooke Group, 509 U.S. at 225-26.

b. The Federal Trade Commission Act

Predatory pricing can also be a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), which empowers the Federal Trade Commission (FTC) "to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." "Unfair" practices are defined to mean those that "cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

In particular, the courts have found that selling at unreasonably low prices with the intent to eliminate competition is an "unfair method of competition" and that 15 U.S.C. § 45 empowers the FTC to eliminate such practices in their incipiency. See, e.g., FTC v. Hunt Foods & Industries, Inc., 178 F. Supp. 448, 454 n.19 (S.D. Cal. 1959), aff'd, sub nom. Hunt Foods & Industries, Inc. v. FTC, 286 F.2d 803 (9th Cir. 1959), cert. denied, 365 U.S. 877 (1960). According to the FTC's website, however, the Commission "has not found predatory pricing violations in recent years, but it examines potential violations very carefully and maintains a close watch for other kinds of tactics -- like raising competitors' costs -- that may disadvantage rivals."

2. Predatory pricing under the federal communications laws

Section 201(b) of Title II of the Communications Act, which applies to common carriers, prohibits "unjust or unreasonable" rates. For the purposes of Title II, the FCC has determined that predatory pricing is "unjust and unreasonable" and is therefore prohibited by Section 201(b). But even with this statutory basis for agency action against predatory pricing by common carriers, the FCC has bound itself to the fact-intensive predatory pricing analysis established by the antitrust acts and the U.S. Supreme Court (as described above).

Cable operators are not subject to the Act's common carrier requirements, including Section 201(b). Because there is no provision analogous to Section 201(b) in Title VI of the Communications Act (the "Cable Act"), overbuilders that have been victimized by predatory pricing have sought remedies elsewhere. For example, in In the Matter of Armstrong Communications, Inc., 2001 WL 43378, the complainant, Citizens Cable, pointed to Section 623(d), which provides as follows:

UNIFORM RATE STRUCTURE REQUIRED -- A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

The FCC rejected Citizens Cable's claim, finding that the Commission lacks authority under Section 623(d) or its implementing regulations to remedy pricing practices that would be considered "predatory" under the antitrust laws:

Citizens Cable also alleges that Armstrong is engaging in predatory pricing through its non uniform pricing and asks that the uniform rate requirement be enforced for this reason. Citizens Cable Ex Parte Presentation at 5 6. Section 623(d) of the Communications Act, 47 U.S.C. § 543(d), exempts bulk discounts to multiple dwelling units from the uniform rate requirement but provides that cable systems not subject to effective competition may not charge predatory prices to a multiple dwelling unit. It does not provide for broader Commission review of allegations of predatory pricing. Section 76.984 on which Citizens Cable relies implements this statutory provision. It does not provide for the broader antitrust review of Armstrong's rates that Citizens Cable seeks.

Armstrong, 2001 WL 43378, 10 n.34.

Another potential vehicle for the FCC to act against predatory pricing is Section 628(b), one of the programming access provisions that Congress enacted as part of the Cable Act amendments of 1992. Section 628(b) provides that:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

Although the Commission has thus far applied Section 628(b) only to unfair methods of competition "in the sale of satellite cable and satellite broadcast programming," see, e.g., Cross Country Cable, Inc. v. C-TEC Cable Systems of Michigan, Inc., 16, 12 FCC Rcd 2538, 1997 WL 90991, there is nothing in the language or legislative history of Section 628(b) that compels such a narrowing construction. To the contrary, when a cable operator attempts to drive a competitor out of the market, the cable operator's purpose is "to hinder significantly or to prevent [a] multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." Moreover, in implementing Section 628(b) of the Act, the Commission has specifically recognized the potential expansive breadth of this provision, stating:

This provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of 628(b) applies on its face to all cable operators.

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd. 3359 (April 1, 1993).

In summary, while one could reasonably argue that the FCC has sufficient existing authority to take action against predatory pricing in the cable industry, the FCC appears to doubt that it has the power to do so.

3. Evidence of predatory pricing by MSOs

Michael Goodman, an analyst with The Yankee Group, said in early 2002: "The FCC says it wants competition. This is what competition is. You try to win my subscribers. I try to win them back. This is the way the game is played." (Austin American-Statesman, February 7, 2002, at A1). Mr. Goodman's simple statement sounds great for consumers - surely, consumers must benefit from good, healthy competition, even if - or especially if - it involves targeted win-back schemes.

In the long run, however, consumers do not benefit from win-back schemes of the kind that the several major incumbent cable operators are using today. In such schemes, the operator uses profits from non-competitive markets to subsidize below-cost prices in markets where they face head-to-head competition. The incumbent does not offer these prices to everyone, but only to subscribers who have already gone over to a competitive overbuilder or are in the process of doing so. Nor does the incumbent make these prices available only as a short-term promotion. Rather, it leaves the discounted prices in place, or extends them repeatedly, in the hope that they will drive the overbuilder out of the market and leave the MSO with no effective deterrent to raising prices to monopoly levels. Such behavior not only harms the overbuilder that is directly under attack, but it also sends a chilling message to potential competitors and to financial markets - i.e., "Don't even think about competing with us because we can do this whenever and wherever we want!" In the end, the ultimate victim is the public interest in robust competition.

Take, for example, the conduct of Charter Communications Company in Scottsboro, Alabama, where it competes with the municipal cable system operated by the Scottsboro Electric Plant Board. In 2000, while charging $72.99 to $79.99 a month for approximately 150 premium channels in nearby communities in which it faced no competition, Charter offered Scottsboro's customers 200 premium channels for $19.95 to $24.95 a month, depending on the time of acceptance. Later, Charter sweetened its offer by adding a free month of service, $200 cash for switching to Charter's cable service, an additional $200 cash for switching to Charter's high speed Internet service, and amnesty on past debts owed to Charter or its predecessor. Through these tactics, Charter has to date lured away more than a third of Scottsboro's subscribers.

Scottsboro called Charter's conduct to the FCC's attention in August 2001. Using Charter's own data in its latest 10Q Report to the Securities and Exchange Commission, Scottsboro showed that Charter's monthly rate of $24.95 to Scottsboro's subscribers was $0.87 less than its nationwide average monthly operating expense of $25.82 per subscriber. Adding to this loss the economic effects of Charter's payment of $200 to each Scottsboro subscriber who switched to Charter's cable television service, Scottsboro showed that Charter was losing at least $210 a year on every cable subscriber that it snatched from Scottsboro. Scottsboro's estimates were highly conservative because they did not take into account Charter's losses of $60 a year on subscribers who paid $19.95 rather than $24.95 a month, Charter's losses of at least $110 a year on each Scottsboro subscriber who switched to Charter's Internet service, and Charter's losses in its "amnesty" program.

Subsequently, Scottsboro furnished the FCC a more detailed analysis focusing Charter's programming costs for the 200 premium services that it was offering to Scottsboro's subscribers. This analysis showed that Charter was paying an average of $36.85 per month just for the programming that it was selling for $24.95 or $19.95 a month. The $36.85 a month did not include Charter's capital and other operating costs, its payments of up to $400 each to induce Scottsboro's subscribers to switch to Charter's cable and Internet service, and its losses of principal and interest in its amnesty program. In short, on just its programming costs, Charter was losing between $11.90 and $16.90 a month, or $142.8 to $202.80 a year, on every cable subscriber that it took from Scottsboro.

After Scottsboro filed its evidence, a private-sector overbuilder - Knology, Inc. - filed comments showing that Charter was engaging in similar anticompetitive tactics in markets in which Knology was seeking to compete. The FCC gave Charter every opportunity to respond to Scottsboro's and Knology's evidence. In fact, the FCC expressly asked Charter to respond in detail. But Charter never contested the facts that Scottsboro and Knology presented. Rather, Charter claimed that its tactics were "simply competition" and that the FCC had no authority to do anything to stop them.

In paragraphs 196-209 of its Eighth Annual Video Competition Report, the FCC discussed at length the comments that it had received from Scottsboro, Knology and Charter, and it concluded,

As the cases presented above suggest, subscribers usually benefit from "head-to-head" competition. In communities where "head-to-head" competition has been sustained for a long period of time, customers generally receive lower monthly rates and better service, while operators generally enjoy higher penetration rates and lower churn rates. Commenters report that, however, in some cases, particularly where a new entrant may appear vulnerable for financial or other reasons, the initial response of a large incumbent MSO to competition may be motivated by anticompetitive animus rather than legitimate business concerns. Further, commenters informed us that, because of the difficulty and cost of pursuing antitrust remedies, it may be that the target of anticompetitive conduct is without practical remedy.

The allegations made in the comments of Scottsboro and Knology highlight the difficulties of new entrants that, for whatever reason, are capable of competing only within a confined geographic region. The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a single system entrant. Moreover, we are concerned about the signal such targeting may send to others who would compete in the MVPD [multichannel video programming distributor] market, and particularly to the financial markets to which a new entrant may well be dependent for resources. However, it is not clear that we have specific statutory authority to address these kinds of problems directly. There has been some suggestion that our authority to prohibit anticompetitive acts or unfair practices under section 628 of the Act would reach targeted and predatory competitive responses. Alternatively, it may be that we would have to seek additional authority from Congress in order to combat such practices, which tend to limit competition and discourage new entry.

Eighth Annual Video Competition Report at 208-09.

Predatory pricing also emerged as a significant issue in the AT&T Broadband/Comcast merger. In particular, WideOpenWest, a private-sector overbuilder, showed that Comcast regularly offers unpublished, targeted discounts to attract or hold on subscribers. Comcast and AT&T tried to downplay these practices as "healthy competition," but the FCC was not persuaded:

Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicant may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers.

We also disagree with Applicants' claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry. . . .

We do not agree with the Applicants that targeted pricing enhances competition. To the contrary, targeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilders' inability to compete against an incumbent who uses such strategies. Thus, we believe that targeted pricing as described in this record could harm MVPD competition. Nevertheless, we are unable to conclude that this transaction will aggravate the problem. Accordingly, we decline to impose any conditions on the merger that would require the merged entity to post its rates and promotions on its website or otherwise facilitate the dissemination of pricing and discount information within local franchise areas.

Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level. We take cognizance of the fact that the DOJ may have begun an investigation into this behavior, and that local franchise authorities have imposed requirements of the type RCN advocates to prevent such conduct. The Media Bureau and Enforcement Bureau currently are reviewing complaints by overbuilders concerning these practices. We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis.

AT&T/Comcast Merger Approval Order 33-34 (emphasis added) (footnotes omitted).

In Appendix A, we document numerous other examples of predatory pricing by the nation's largest incumbent cable operators. Given the nature of our information gathering, we cannot guarantee that all of the information in Appendix A is completely accurate or current. Nor have we subjected these cases to detailed analyses of the kind that was presented to the FCC for Scottsboro. Still, given the sheer quantity of the information available, it seems beyond doubt that predatory pricing is a widespread phenomenon across the United States. At a minimum, this information warrants further investigation.

B. Rate discrimination

In the previous section, we focused on "predatory pricing" as formally defined in the antitrust laws. In this section, we turn to rate discrimination, a practice that can be anticompetitive and contrary to the public interest even if the perpetrator does not charge below-cost rates or have a reasonable probability of its recouping losses after driving its competitor out of the market.

In the cable industry today, several major MSOs are practicing targeted rate discrimination through what they call euphemistically "win-back" programs. These programs have a common and critical feature - the MSO does not offer its own subscribers the same special deals that it offers to subscribers who have transferred, or are threatening to transfer, their business to an overbuilder. If the MSOs had to offer the same deals to all of their own subscribers, they might well abandon this form of anticompetitive behavior.

For example, assume that an incumbent has 10,000 subscribers in a franchising area and that its nascent competitor has 1,000. Assume further that the incumbent estimates that offering the competitor's subscribers a discount of $20 a month for a year would attract 25 percent of the competitor's subscribers and significantly impair the competitor's business plan. The discount would cost the incumbent $60,000 ($20/month x 12 months x 25% x 1,000 subscribers). Even if the $60,000 was wholly or partially below cost, the incumbent would probably be willing to pay that price in return for the freedom to charge whatever it wanted to all 11,000 subscribers in the market after driving its competitor out. If the incumbent had to offer the same deal to all of its subscribers, however, doing so would cost it an additional $2,400,000 ($20/month x 12 months x 10,000 subscribers). In the latter case, the incumbent would probably decide that crushing its competitor was not worth the cost.

It was precisely for this reason that Congress enacted the uniform rate requirement in Section 623(d) of the Communications Act, 47 U.S.C. § 521(d), as part of the Cable Television Consumer Protection and Competition Act of 1992. According to the FCC, the purpose of Section 623(d) was "'to prevent cable operators from having different rate structures in different parts of one cable franchise ... [and] to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily.'"

In the Telecommunications Act of 1996, however, acting on the assumption that the new Act would rapidly bring meaningful competition to the cable industry, Congress amended uniform rate requirement in Section 623(d) to add the following "effective competition" exception:

This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

While an "effective competition" exception may sound reasonable in theory, the FCC has interpreted "effective competition" in ways that render that term all but useless in identifying markets in which true competition can fairly be said to exist. To the contrary, the FCC's interpretations have opened the door to precisely the kinds of anticompetitive behavior that Congress sought to prevent by enacting the uniform rate provision.

Specifically, in Section 623(l) of the Telecommunications Act, 47 U.S.C. §543(l), Congress specified four criteria for determining where "effective competition" exists:

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

While the FCC's implementing regulations in 47 CFR 76.905(b) largely mirror the statutory definitions of "effective competition," the Commission's interpretations of these definitions have essentially gutted them.

As NATOA explained in its comments in the FCC's pending proceeding on rate regulation, the FCC's decisions applying 47 U.S.C. § 543(l) and 47 CFR § 76.905(b) are flawed in several respects. For one thing, two or more cable operators often have overlapping franchises to serve an entire franchising area, but instead of overbuilding and competing with each other, they merely divide the market into non-competitive zones. Even though no subscriber has an actual choice between competing cable operators, the FCC has typically found that "effective competition" exists in these situations because the cable operators might compete with each other some day.

Similarly flawed is the FCC's growing practice of determining "effective competition" solely on the basis of competition from Direct Broadcast Satellite (DBS) providers. Not only are such determinations fraught with evidentiary problems, but even assuming that competition from DBS providers can be established in a particular case, there is no evidence that competition from DBS providers exerts any downward pressure on cable rates. To the contrary, as NATOA's comments point out, "the notion that DBS 'competition' alone suffices to keep rates reasonable flies in the face of the Commission's own finding that 'the presence of effective competition due to DBS overbuild status has no significant effect on cable rates.' The fact is that DBS 'competition' is not keeping rates down, no matter how much the cable industry may fear it. Thus, to depend on DBS is to abandon the Commission's responsibility under the law to protect subscribers from unreasonable rates."

In its early cases involving the DBS test, the FCC appears to have been focusing on the prospect of rate increases by the incumbent. Now, however, the DBS test - and the FCC's precedents on it - have come into play in cases in which the incumbent's main purpose is to offer targeted discounts to thwart competition. A good example is the FCC's recent decision involving Arcadia, CA. In that case, overbuilder Altrio Communications alleged

[I]n November 2001, immediately before Altrio began its service launch and advertising campaign, Adelphia's rates were $33.33 for analog expanded basic service, and an additional $10.00 for digital expanded basic service and $39.99 for cable modem service. In addition, Adelphia offered expanded basic service at $19.95 per month, as well as cable modem service for $19.95 for the first three months of service, as a special promotion to new customers. Altrio indicates that after the launch of its service in December 2001, Adelphia offered an "extraordinary deal" to its existing customers for one year in which Adelphia increased its analog channels by twelve (57-69 channels), its digital channels by 81 (8-89 channels), dropped its rates to $19.95 for analog expanded basic service, charged only an additional $5.88 for digital expanded basic, and offered cable modem service for $19.95. Altrio also asserts that Adelphia customer service representatives engaged in "minute-by-minute" changes in its offers and short-term price cuts to retain existing customers contemplating a switch to Altrio, and to attract new customers.

Altrio Communications at 3. On their faces, these discriminatory rates plainly violated Section 623(d). Shortly after Altrio filed its complaint, however, Adelphia petitioned the FCC to find that it was subject to effective competition in Arcadia as of October 1, 2001, because two DBS providers, EchoStar and DirectTV, offered service in portions of the city. Id. at 5. The FCC agreed and dismissed Altrio's complaint. Id. at 6.

The FCC's interpretation of the fourth statutory criterion is also seriously defective. When Congress fashioned the so-called "LEC test" in 1996, it intended the test to apply to the Bells and other major incumbent local exchange carriers, which Congress expected to become major and ubiquitous players in the cable industry. The FCC, however, has applied the LEC test indiscriminately to competitive local exchange carriers, even to those with as little as 15% current market share and little, if any, possibility of building out the rest of their systems for up to 5½ years. To make matters worse, in the absence of a homes-passed or actual subscribership standard under the LEC test, as there is under the other tests in Section 623(l), the FCC has found that "effective competition" can be found to exist as long as the LEC is planning to provide cable TV service in an area overlapping the incumbent's territory. In short, under the FCC's interpretation of the LEC test, "effective competition" can be found even where the competitor has a minimal number of subscribers and where the vast majority of customers in a given area have no competitive alternative at all.

So predictable have FCC rulings of "effective competition" become under the LEC Test, that some MSO's have not even bothered to file applications for such rulings before introducing discriminatory rate discounts. Like Adelphia in Arcadia, CA, Time Warner filed applications for effective competition determinations for Austin, San Marcos, and San Antonio, TX, only after private-sector overbuilder Grande Communications file a complaint alleging rate discrimination. At the time of this writing, Time Warner's effective competition petition is still pending at the FCC.

In summary, the FCC's interpretations of 47 U.S.C. § 543(l) and 47 CFR § 76.905(b) allow for "effective competition" rulings where meaningful competition does not exist. Far from identifying the markets in which competition has taken hold, the FCC's interpretations have perversely been transformed into vehicles that serve to defeat Congress's pro-competitive goals.

C. Denial of Video Programming and Other Critical Content

1. Video programming

In the Cable Act of 1992, Congress banned unfair and anticompetitive restrictions on access to cable programming, including certain exclusive contracts, and required satellite-based distributors in which MSOs had attributable interests to make cable programming available to competitors of the MSOs on a non-discriminatory basis. As the FCC has recently observed, Congress included these programming access provisions in 1992 Act because it considered access to programming to be "critical to competitive survival." "Congress believed it unlikely that new market entrants could compete effectively unless they could gain access to vertically integrated, satellite delivered programming," and "incumbent providers had both the incentive and the ability to deny [access] to new competitors."

Before discussing the strengths and weaknesses of the current programming access laws and regulations, it is useful to examine the state of vertical integration in the cable industry. "Vertical integration" in this context means that one or more MSOs hold a significant ownership interest in a video programming distributor. Of the 308 satellite-delivered national programming networks existing in 2002, 92 (approximately 30 percent) were vertically integrated with at least one cable MSO. Ninth Annual Video Competition Report at 134. Four of the top six cable MSOs held ownership interests in programming networks, and at least one of these MSOs had an interest in 79 of these 92 networks. Id. at 135. In terms of subscribership, eight of the top 20 video programming networks were vertically integrated with a cable MSO in 1992. Id. at 136. Furthermore, of the top 50 programming networks, only four were not affiliated with a cable company - C SPAN, C SPAN2, WGN, and the Weather Channel. Of these four, MSOs provided 95% of the funding for C SPAN and C-SPAN2. Ninth Annual Video Competition Report at 136 n. 451. Thus, vertical integration and other potential sources of MSO influence over video programming distributors is a major fact of life in the cable industry.

Against this backdrop of extensive vertical integration and control, the statutory requirements and FCC rules on programming access fall into three categories. First, Section 628(b) of the Communications Act, 47 U.S.C. § 528(b), sets forth a general prohibition on unfair practices by vertically integrated cable operators and satellite-delivered programming vendors. Second, Section 628(c) of the Communications Act, 47 U.S.C. § 528(c), prohibits vertically integrated cable operators and programming vendors from engaging in certain specific unfair practices. These practices include exertion of undue or improper influence on the programming vendor's prices, terms and conditions, and discrimination in establishing prices, terms or conditions (subject to several exceptions).

Third, Sections 628(c)(2)(C) and (D) of the Communications Act, 47 U.S.C. §§ 528(c)(2)(C) and (D), prohibit vertically integrated cable operators and programming vendors from entering into, or renewing, exclusive contracts under most circumstances. This prohibition was to expire on October 5, 2002, unless the FCC affirmatively determined that extending it by up to five years was necessary and in the public interest. In June 2002, following an extensive notice-and-comment proceeding, the FCC did so, finding that:

It is evident that competition in the MVPD market has increased in some respects since 1992. We are not persuaded by the arguments presented by cable MSOs, however, that market conditions have changed so fundamentally, and competition in the distribution of video programming is now so robust, that vertically integrated programmers no longer have the incentive to favor affiliated cable operators such that, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.

Exclusive Contract Report at 65.

Significantly, the FCC declined to use this opportunity to close loopholes in its exclusive contracts rules, particularly the failure of the rules to bar exclusive contracts involving video programming delivered terrestrially by fiber optic cable. The FCC was well aware of the significance of this gap: "We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could have an impact on the ability of alternative MVPDs to compete in the video marketplace." The FCC also recognized that vertically integrated entities "may have an incentive to shift regional sports networks from satellite to terrestrial distribution and thereby avoid the ambit of program access rules." Furthermore, the FCC was aware that increased "clustering" in the cable industry could exacerbate the anticompetitive effects of terrestrially-delivered video programming.

[I]t is likely that cable systems in a large cluster will be linked through a fiber optic network which would enable operators to offer telecommunications services as well as a cost-efficient means of delivering programming to its clustered systems. However, if MSOs have an ownership interest in programming, fiber optic networks may give them an added incentive to 'migrate' programming from satellite delivery to terrestrial (fiber optic) delivery because only satellite-delivered programming is subject to the program access rules. Therefore . . . a vertically integrated incumbent may be able to prevent competitors from gaining access to certain programming because it is terrestrially delivered.

Nevertheless, the FCC declined to address terrestrially-delivered programming in its Exclusive Contracts Report, concluding that it lacks statutory authority to extend its exclusive contracts rules beyond satellite-delivered programming:

The Commission has noted that terrestrial distribution of programming could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market. Nonetheless, the Commission has concluded that the language of Section 628(c) expressly applies to "satellite cable programming and satellite broadcast programming," and that terrestrially delivered programming is "outside of the direct coverage of Section 628(c)." We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion. The Senate version of the legislation that became Section 628 would have applied the program access provisions to all "national and regional cable programmers who are affiliated with cable operators." The House version, by contrast, expressly limited the provisions to "satellite cable programming vendor[s] affiliated with a cable operator." The Conference agreement adopted the House version with amendments. Given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.

Exclusive Contracts Report at 73 (footnotes omitted).

Later in 2002, the FCC returned to these and other programming-access concerns during its review of the AT&T/Comcast merger. Once again, it decided not to act:

With respect to nationally distributed programming, the record contains little evidence that the program access rules will be insufficient to ensure that competing MVPDs have access to important programming that is affiliated with a cable operator. To the extent that affiliated national programming is delivered via satellite, it is covered by our program access rules. Nothing in the record suggests that the merger would affect the cost of transmitting affiliated national programming over terrestrial infrastructure and thereby make it more cost-effective to deliver such programming in that manner..... [W]e cannot conclude that the merger will harm the public interest with respect to exclusive distribution of affiliated, satellite-delivered national programming.

With regard to clustering - which would be a particularly significant issue in the context of the AT&T Comcast merger - the FCC concluded, "To the extent that clustering raises concerns about a cable operator's ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide .... The appropriate forum for consideration of this issue, therefore, is a rulemaking of general applicability." In fact, the FCC maintained, it had already initiated such a rulemaking proceeding "to establish limits on cable operators' horizontal reach pursuant to § 613 of the Communications Act, which directs the Commission to establish such limits to prevent cable operators, because of their subscriber reach, from unfairly impeding the flow of programming to consumers."

The application of the program access rules to terrestrially-delivered programming is likely to be increasingly necessary to accomplish the objectives of the program access statute. As the program access statute itself only concerns "satellite-delivered programming," however, it appears that Congressional action may be required to effect such a change.

b. Other forms of content

As consumers come to expect cable operators to provide new enhanced products and services, the risk grows that MSOs will be able to gain advantages over nascent competitors by blocking their access to such new enhanced products and services. This has already begun to occur in the context of interactive television services (ITV). One such service is video-on-demand (VOD).

At the time of the AT&T/Comcast merger, Comcast possessed an 11 percent ownership interest, and AT&T a 44 percent interest, in iNDEMAND, a VOD service provider. According to the Consumer Federation of America, Comcast's use of exclusive contracts and discriminatory conduct has allowed Comcast to make "substantial inroads" with content suppliers. AT&T/Comcast Approval Order at 161. Similarly, RCN claimed that Comcast's financial interest in Worldgate's TV Gateway product had enabled Comcast to block RCN's access to that product. Id. Elsewhere, WideOpenWest had reported to the FCC that it could not obtain access to iNDEMAND because of an exclusive contract between it and an MSO, and Everest Connections had reported that, for the same reason, it could not obtain access to iNDEMAND and two other VOD services, Diva and Concurrent.

The FCC declined to address the issue of competitive access to VOD in the context of the AT&T/Comcast merger, stating that the merger "will not enhance or create incentive to impede technological developments in the emerging ITV market" and that "the merged entity would not serve a large enough proportion of MVPD subscribers to close out competitors through exclusive contracts." Id. at 165. Previously, however, in a Notice of Inquiry (NOI) focusing specifically on the implications of vertical integration in ITV services, the FCC had solicited comments on "whether cable operators should be prohibited from discriminating among ITV service providers." In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Dkt. No. 01-7, Notice of Inquiry, FCC 01-15 (rel. January 18, 2001) at 3. That proceeding is still open.

VOD is just beginning to take hold. By 2005, VOD revenues are projected to range between $278 million and $3 billion. Ninth Video Competition Order at 39. If anticompetitive practices in the ITV area are to be prevented, the time to do so is now.

D. Blocking Access to Multiple Dwelling Units

An overbuilder can enter a community only if it has a reasonable prospect of meeting substantial market penetration targets. That would be difficult, if not impossible, to do if the incumbent could shut the overbuilder out of a substantial portion of the market. Tying up multiple dwelling units (MDUs) in exclusive long-term contracts is yet another way that MSOs have thwarted competition from overbuilders.

For example, in many communities in North Carolina, including Charlotte and Raleigh, MDUs comprise over 30 percent of the cable subscriber market. Upon learning that Carolina Broadband intended to overbuild the area, the incumbent cable operator, Time Warner, mounted an aggressive campaign to secure long-term, exclusive contracts with the owners of the MDUs that Carolina Broadband sought to serve. Among other things, Time Warner heavy-handedly threatened to disconnect cable service if the owners of the MDUs did not agree to sign exclusive agreements of five or more years. According to the FCC, Time Warner obtained long-term commitments affecting approximately 80 percent of the MDU units in Charlotte, with "many of these agreements taking place after Carolina Broadband announced its intent to serve the area." Time Warner's tactics proved to be very effective: without access to nearly one-third of its potential subscribers, Carolina Broadband's overbuild efforts ground to a halt.

The FCC raised concerns about exclusive cable contracts in MDUs in a rulemaking initiated in 1997. After allowing the rulemaking to languish for nearly six years, the FCC concluded on January 29, 2003, that the record before it did not justify a ban or a time limit on such contracts:

In sum, we find that the record does not support a prohibition on exclusive contracts for video services in MDUs, nor a time limit, in the nature of a cap, for such contracts. The parties have identified both pro-competitive and anti-competitive aspects of exclusive contracts. We cannot state, based on the record, that exclusive contracts are predominantly anti-competitive. With respect to capping such contracts, there appears to be little agreement over the length of term. Again, based on the record, we cannot discern the "correct" length. We note that competition in the MDU market is improving, even with the existence of exclusive contracts. Accordingly, we decline to intervene. Because we are not banning or capping exclusive contracts, we also decline to address arguments pertaining to the Commission's authority to do so.

Having so recently decided this issue, it is unlikely that the FCC would want to revisit it anytime soon - at least in isolation from other anticompetitive activities. Carolina Broadband's experience suggests, however, that the information that the FCC obtained when it launched its inquiry on MDUs years ago may not fully reflect current realities.

E. Other Anticompetitive Practices

MSO's have also engaged in a host of other anticompetitive practices. These include, but are by no means limited to, the following activities:

? Refusing to deal with suppliers and contractors that provide services to competitors

? Hiring away key employees of competitors

? Using litigation to prevent or delay competition

? Refusing to carry advertising of overbuilders

? Interfering with local franchise processes

? Flooding local media with misinformation about public communications initiatives

? Lobbying for anticompetitive state laws

Combined with the other anticompetitive practices discussed above, these tactics seriously undermine the pro-competitive goals that Congress has expressed for the cable industry for the last two decades.

Conclusion

As shown above, anticompetitive conduct by MSOs takes many forms and shapes. Addressing such misconduct on a case-by-case basis before the FCC, the DOJ, the FTC, state agencies or the courts would be prohibitively burdensome, time-consuming and expensive for NATOA and its allies. This would also be true of an issue-by-issue approach before the FCC or Congress. Furthermore, partial successes that left major areas of anticompetitive conduct intact would ultimately do little to create a truly competitive environment.

In short, anticompetitive behavior by MSOs is a multi-headed monster. In the Cable Act of 1992, Congress lopped off the anticompetitive

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BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMPETITION
AND BUSINESS AND CONSUMER RIGHTS

HEARING ON

"CABLE COMPETITION - INCREASING PRICE; INCREASING VALUE?"

FEBRUARY 11, 2004

DIRKSON S-226

ATTACHMENT TO TESTIMONY OF
CORALIE WILSON, PRESIDENT

THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS

THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS

REPORT ON

ANTICOMPETITIVE PRACTICES BY INCUMBENT CABLE OPERATORS

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February 2004
Introduction by NATOA: This report was originally prepared at the request of the National Association of Telecommunications Officers and Advisors' Board of Directors. The report was presented to the Board of Directors in March 2003. The report has been used to supplement our understanding of some obstacles to meaningful competition in our communities, and to better ascertain whether there are actions that may be taken by local government to enhance the ability of competition to take hold and flourish. Some portions of the report relating to advice or strategy have been removed prior to its distribution beyond the leadership of the Board. While NATOA has agreed to make the content of the analysis available for further consideration, NATOA specifically cautions the reader that examples contained in the report that imply anticompetitive behavior are the result of media reports, direct member or local government reports or public information. Incumbent providers have not been asked by NATOA to specifically respond to such allegations. Except as indicated herein, examples have not been further tested, verified or otherwise subjected to scrutiny by NATOA. Further, the reader is encouraged to verify accuracy of any information which may have changed as a result of the passage of time.

OVERVIEW

In recent months, the Federal Communications Commission ("Commission" or "FCC") has expressed increasing alarm about anticompetitive behavior by some of the nation's largest cable operators. To date, however, the Commission has not taken any concrete steps to address this issue. To the contrary, and perhaps unintentionally, the Commission has issued a number of piecemeal decisions and orders that have exacerbated the problem.

At the request of NATOA's Board of Directors, the Baller Herbst Law Group has gathered a substantial amount of information about the anticompetitive practices of the major multi-system operators (MSOs). We obtained much of this information from members of NATOA, the American Public Power Association (APPA), and the Broadband Service Providers Association (BSPA). We also reviewed pleadings and rulings in cases before the FCC, the DOJ, the Federal Trade Commission (FTC) and the courts; federal and state agency reports; law review articles; legal treatises; newspapers and magazines; and various other sources.

Our research focused on predatory pricing, rate discrimination, denial of access to programming, exclusion of competitors from multiple dwelling units (MDUs), threats not to do business with contractors and suppliers that wanted to serve new competitors, and an assortment of other unfair business practices. Our research confirmed that anticompetitive behavior by the major MSOs is a significant and growing threat to competition in the cable industry.

ANALYSIS

In Section I below, we begin with an overview of the undisputed fact that healthy competition in the cable industry furthers the public interest. In Section II we discuss the specific anticompetitive practices of cable MSOs.

I. THE BENEFITS OF COMPETITION

According to the FCC, there are a total of 9,667 cable systems in the United States, and of these, only 64 faced competition from public or private overbuilders as of November 2002. Where overbuilds have occurred, they have greatly benefited consumers. According to the FCC, "[a]vailable evidence indicates that when an incumbent cable operator faces 'effective competition,' as defined by the Communications Act, it responds in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer service and adding new services such as interactive programming."

More specifically, in each of its last two reports on cable pricing, the FCC has found that consumers in competitive markets pay cable rates that average 6.3 percent lower than cable rates in non-competitive markets. In fact, this so-called "competitive differential" is likely to be significantly higher than 6.3 percent because, as discussed more fully below, the FCC's flawed definition of "effective competition" results in the inclusion of rate differentials from many markets in which no meaningful competition exists.

The average system capacity of incumbent cable systems is 14 MHz greater in competitive markets than in non-competitive markets. Ninth Annual Video Competition Report at 24, Table 3. Incumbents in competitive markets are 5.2 percent more likely than incumbents in non-competitive markets to have upgraded their systems to 750 MHz or higher. Id. Similarly, the average number of channels in competitive markets is greater than in non-competitive markets (83.3 to 81.7). Id.

Furthermore, the FCC has also found that incumbent cable operators are more price- sensitive to competition from wireline overbuilders than they are to satellite competitors:

In those areas where a cable operator faces effective competition from a wireline overbuilder (i.e., where a finding of effective competition was based on the [Local Exchange Carrier] LEC test or the wireline portion of the overbuild test), we found that operators tend to offer more channels at a lower rate. In the few areas where the Commission has made a finding of effective competition as a result of [Direct Broadcast Satellite] DBS penetration, we found that the presence of DBS competition had no statistically significant effect on the demand for cable service or on cable rates.

Healthy competition in the cable industry undisputedly furthers the public interest. Several of the large MSOs, however, are less than keen on it. They possess both the ability and the natural inclination to eliminate nascent competition, and, as discussed in the following section, they have employed a variety of anticompetitive tactics to do so.

II. ANTICOMPETITIVE PRACTICES OF MSOs

When faced with competition from overbuilders, several of the largest incumbent cable operators have resorted to anticompetitive practices of various kinds. In this section, we discuss the major categories of anticompetitive behavior that our research has disclosed - predatory pricing, rate discrimination, denial of access to programming, unfair conduct concerning access to MDUs, and other unfair competitive practices.

A. Predatory Pricing

1. Predatory pricing under the federal antitrust laws

a. The Sherman Act

Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, provides that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Predatory pricing is one of the many ways in which a would-be monopolist can violate Section 2 of the Sherman Act. As the FCC has observed, "[p]redatory pricing involves 'deliberately pricing below cost to drive out rivals and raising the price to the monopoly level after their exit.' Thus, the offense of predatory pricing has two elements: a pricing element and a subsequent recoupment element." Panamsat v. Comcast, 12 FCC Rcd 6952, FCC 97-172 (released May 20, 1997), quoting Price Cap Performance Review for Local Exchange Carriers, 11 FCC Rcd 858, 870-871 (1995).

In Brooke Group Ltd v. Brown & Williamson Tobacco Corporation, 509 U.S. 209 (1993), the United States Supreme Court said of the pricing element that "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. ... [O]nly below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." Id. at 223 (citations omitted).

In the course of spelling out how it would determine whether discounts to multiple dwelling units (MDUs) were predatory, the FCC noted that it was required to apply the teaching of Brooke Group. With regard to the below-cost pricing element, the FCC said that "we will consider whether a cable operator's price to an MDU recovers at least the incremental costs of serving that MDU, including any new costs from constructing or upgrading its physical facilities in order to offer the bulk service agreed to with the building's owner or manager, and whether the cable operator has a reasonable prospect of recouping its investment in below cost prices in the MDU."

The recoupment element, the Supreme Court continued in Brooke Group, is satisfied when the following conditions are met:

For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.

If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, "[i]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices."

Evidence of below-cost pricing is not, alone, sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain situations - for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity - summary disposition of the case is appropriate.

Brooke Group, 509 U.S. at 225-26.

b. The Federal Trade Commission Act

Predatory pricing can also be a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), which empowers the Federal Trade Commission (FTC) "to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." "Unfair" practices are defined to mean those that "cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

In particular, the courts have found that selling at unreasonably low prices with the intent to eliminate competition is an "unfair method of competition" and that 15 U.S.C. § 45 empowers the FTC to eliminate such practices in their incipiency. See, e.g., FTC v. Hunt Foods & Industries, Inc., 178 F. Supp. 448, 454 n.19 (S.D. Cal. 1959), aff'd, sub nom. Hunt Foods & Industries, Inc. v. FTC, 286 F.2d 803 (9th Cir. 1959), cert. denied, 365 U.S. 877 (1960). According to the FTC's website, however, the Commission "has not found predatory pricing violations in recent years, but it examines potential violations very carefully and maintains a close watch for other kinds of tactics -- like raising competitors' costs -- that may disadvantage rivals."

2. Predatory pricing under the federal communications laws

Section 201(b) of Title II of the Communications Act, which applies to common carriers, prohibits "unjust or unreasonable" rates. For the purposes of Title II, the FCC has determined that predatory pricing is "unjust and unreasonable" and is therefore prohibited by Section 201(b). But even with this statutory basis for agency action against predatory pricing by common carriers, the FCC has bound itself to the fact-intensive predatory pricing analysis established by the antitrust acts and the U.S. Supreme Court (as described above).

Cable operators are not subject to the Act's common carrier requirements, including Section 201(b). Because there is no provision analogous to Section 201(b) in Title VI of the Communications Act (the "Cable Act"), overbuilders that have been victimized by predatory pricing have sought remedies elsewhere. For example, in In the Matter of Armstrong Communications, Inc., 2001 WL 43378, the complainant, Citizens Cable, pointed to Section 623(d), which provides as follows:

UNIFORM RATE STRUCTURE REQUIRED -- A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

The FCC rejected Citizens Cable's claim, finding that the Commission lacks authority under Section 623(d) or its implementing regulations to remedy pricing practices that would be considered "predatory" under the antitrust laws:

Citizens Cable also alleges that Armstrong is engaging in predatory pricing through its non uniform pricing and asks that the uniform rate requirement be enforced for this reason. Citizens Cable Ex Parte Presentation at 5 6. Section 623(d) of the Communications Act, 47 U.S.C. § 543(d), exempts bulk discounts to multiple dwelling units from the uniform rate requirement but provides that cable systems not subject to effective competition may not charge predatory prices to a multiple dwelling unit. It does not provide for broader Commission review of allegations of predatory pricing. Section 76.984 on which Citizens Cable relies implements this statutory provision. It does not provide for the broader antitrust review of Armstrong's rates that Citizens Cable seeks.

Armstrong, 2001 WL 43378, 10 n.34.

Another potential vehicle for the FCC to act against predatory pricing is Section 628(b), one of the programming access provisions that Congress enacted as part of the Cable Act amendments of 1992. Section 628(b) provides that:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

Although the Commission has thus far applied Section 628(b) only to unfair methods of competition "in the sale of satellite cable and satellite broadcast programming," see, e.g., Cross Country Cable, Inc. v. C-TEC Cable Systems of Michigan, Inc., 16, 12 FCC Rcd 2538, 1997 WL 90991, there is nothing in the language or legislative history of Section 628(b) that compels such a narrowing construction. To the contrary, when a cable operator attempts to drive a competitor out of the market, the cable operator's purpose is "to hinder significantly or to prevent [a] multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." Moreover, in implementing Section 628(b) of the Act, the Commission has specifically recognized the potential expansive breadth of this provision, stating:

This provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of 628(b) applies on its face to all cable operators.

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd. 3359 (April 1, 1993).

In summary, while one could reasonably argue that the FCC has sufficient existing authority to take action against predatory pricing in the cable industry, the FCC appears to doubt that it has the power to do so.

3. Evidence of predatory pricing by MSOs

Michael Goodman, an analyst with The Yankee Group, said in early 2002: "The FCC says it wants competition. This is what competition is. You try to win my subscribers. I try to win them back. This is the way the game is played." (Austin American-Statesman, February 7, 2002, at A1). Mr. Goodman's simple statement sounds great for consumers - surely, consumers must benefit from good, healthy competition, even if - or especially if - it involves targeted win-back schemes.

In the long run, however, consumers do not benefit from win-back schemes of the kind that the several major incumbent cable operators are using today. In such schemes, the operator uses profits from non-competitive markets to subsidize below-cost prices in markets where they face head-to-head competition. The incumbent does not offer these prices to everyone, but only to subscribers who have already gone over to a competitive overbuilder or are in the process of doing so. Nor does the incumbent make these prices available only as a short-term promotion. Rather, it leaves the discounted prices in place, or extends them repeatedly, in the hope that they will drive the overbuilder out of the market and leave the MSO with no effective deterrent to raising prices to monopoly levels. Such behavior not only harms the overbuilder that is directly under attack, but it also sends a chilling message to potential competitors and to financial markets - i.e., "Don't even think about competing with us because we can do this whenever and wherever we want!" In the end, the ultimate victim is the public interest in robust competition.

Take, for example, the conduct of Charter Communications Company in Scottsboro, Alabama, where it competes with the municipal cable system operated by the Scottsboro Electric Plant Board. In 2000, while charging $72.99 to $79.99 a month for approximately 150 premium channels in nearby communities in which it faced no competition, Charter offered Scottsboro's customers 200 premium channels for $19.95 to $24.95 a month, depending on the time of acceptance. Later, Charter sweetened its offer by adding a free month of service, $200 cash for switching to Charter's cable service, an additional $200 cash for switching to Charter's high speed Internet service, and amnesty on past debts owed to Charter or its predecessor. Through these tactics, Charter has to date lured away more than a third of Scottsboro's subscribers.

Scottsboro called Charter's conduct to the FCC's attention in August 2001. Using Charter's own data in its latest 10Q Report to the Securities and Exchange Commission, Scottsboro showed that Charter's monthly rate of $24.95 to Scottsboro's subscribers was $0.87 less than its nationwide average monthly operating expense of $25.82 per subscriber. Adding to this loss the economic effects of Charter's payment of $200 to each Scottsboro subscriber who switched to Charter's cable television service, Scottsboro showed that Charter was losing at least $210 a year on every cable subscriber that it snatched from Scottsboro. Scottsboro's estimates were highly conservative because they did not take into account Charter's losses of $60 a year on subscribers who paid $19.95 rather than $24.95 a month, Charter's losses of at least $110 a year on each Scottsboro subscriber who switched to Charter's Internet service, and Charter's losses in its "amnesty" program.

Subsequently, Scottsboro furnished the FCC a more detailed analysis focusing Charter's programming costs for the 200 premium services that it was offering to Scottsboro's subscribers. This analysis showed that Charter was paying an average of $36.85 per month just for the programming that it was selling for $24.95 or $19.95 a month. The $36.85 a month did not include Charter's capital and other operating costs, its payments of up to $400 each to induce Scottsboro's subscribers to switch to Charter's cable and Internet service, and its losses of principal and interest in its amnesty program. In short, on just its programming costs, Charter was losing between $11.90 and $16.90 a month, or $142.8 to $202.80 a year, on every cable subscriber that it took from Scottsboro.

After Scottsboro filed its evidence, a private-sector overbuilder - Knology, Inc. - filed comments showing that Charter was engaging in similar anticompetitive tactics in markets in which Knology was seeking to compete. The FCC gave Charter every opportunity to respond to

Scottsboro's and Knology's evidence. In fact, the FCC expressly asked Charter to respond in detail. But Charter never contested the facts that Scottsboro and Knology presented. Rather, Charter claimed that its tactics were "simply competition" and that the FCC had no authority to do anything to stop them.

In paragraphs 196-209 of its Eighth Annual Video Competition Report, the FCC discussed at length the comments that it had received from Scottsboro, Knology and Charter, and it concluded,

As the cases presented above suggest, subscribers usually benefit from "head-to-head" competition. In communities where "head-to-head" competition has been sustained for a long period of time, customers generally receive lower monthly rates and better service, while operators generally enjoy higher penetration rates and lower churn rates. Commenters report that, however, in some cases, particularly where a new entrant may appear vulnerable for financial or other reasons, the initial response of a large incumbent MSO to competition may be motivated by anticompetitive animus rather than legitimate business concerns. Further, commenters informed us that, because of the difficulty and cost of pursuing antitrust remedies, it may be that the target of anticompetitive conduct is without practical remedy.

The allegations made in the comments of Scottsboro and Knology highlight the difficulties of new entrants that, for whatever reason, are capable of competing only within a confined geographic region. The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a single system entrant. Moreover, we are concerned about the signal such targeting may send to others who would compete in the MVPD [multichannel video programming distributor] market, and particularly to the financial markets to which a new entrant may well be dependent for resources. However, it is not clear that we have specific statutory authority to address these kinds of problems directly. There has been some suggestion that our authority to prohibit anticompetitive acts or unfair practices under section 628 of the Act would reach targeted and predatory competitive responses. Alternatively, it may be that we would have to seek additional authority from Congress in order to combat such practices, which tend to limit competition and discourage new entry.

Eighth Annual Video Competition Report at 208-09.

Predatory pricing also emerged as a significant issue in the AT&T Broadband/Comcast merger. In particular, WideOpenWest, a private-sector overbuilder, showed that Comcast regularly offers unpublished, targeted discounts to attract or hold on subscribers. Comcast and AT&T tried to downplay these practices as "healthy competition," but the FCC was not persuaded:

Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicant may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers.

We also disagree with Applicants' claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry. . . .

We do not agree with the Applicants that targeted pricing enhances competition. To the contrary, targeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilders' inability to compete against an incumbent who uses such strategies. Thus, we believe that targeted pricing as described in this record could harm MVPD competition. Nevertheless, we are unable to conclude that this transaction will aggravate the problem. Accordingly, we decline to impose any conditions on the merger that would require the merged entity to post its rates and promotions on its website or otherwise facilitate the dissemination of pricing and discount information within local franchise areas.

Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level. We take cognizance of the fact that the DOJ may have begun an investigation into this behavior, and that local franchise authorities have imposed requirements of the type RCN advocates to prevent such conduct. The Media Bureau and Enforcement Bureau currently are reviewing complaints by overbuilders concerning these practices. We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis.

AT&T/Comcast Merger Approval Order 33-34 (emphasis added) (footnotes omitted).

In Appendix A, we document numerous other examples of predatory pricing by the nation's largest incumbent cable operators. Given the nature of our information gathering, we cannot guarantee that all of the information in Appendix A is completely accurate or current. Nor have we subjected these cases to detailed analyses of the kind that was presented to the FCC for Scottsboro. Still, given the sheer quantity of the information available, it seems beyond doubt that predatory pricing is a widespread phenomenon across the United States. At a minimum, this information warrants further investigation.

B. Rate discrimination

In the previous section, we focused on "predatory pricing" as formally defined in the antitrust laws. In this section, we turn to rate discrimination, a practice that can be anticompetitive and contrary to the public interest even if the perpetrator does not charge below-cost rates or have a reasonable probability of its recouping losses after driving its competitor out of the market.

In the cable industry today, several major MSOs are practicing targeted rate discrimination through what they call euphemistically "win-back" programs. These programs have a common and critical feature - the MSO does not offer its own subscribers the same special deals that it offers to subscribers who have transferred, or are threatening to transfer, their business to an overbuilder. If the MSOs had to offer the same deals to all of their own subscribers, they might well abandon this form of anticompetitive behavior.

For example, assume that an incumbent has 10,000 subscribers in a franchising area and that its nascent competitor has 1,000. Assume further that the incumbent estimates that offering the competitor's subscribers a discount of $20 a month for a year would attract 25 percent of the competitor's subscribers and significantly impair the competitor's business plan. The discount would cost the incumbent $60,000 ($20/month x 12 months x 25% x 1,000 subscribers). Even if the $60,000 was wholly or partially below cost, the incumbent would probably be willing to pay that price in return for the freedom to charge whatever it wanted to all 11,000 subscribers in the market after driving its competitor out. If the incumbent had to offer the same deal to all of its subscribers, however, doing so would cost it an additional $2,400,000 ($20/month x 12 months x 10,000 subscribers). In the latter case, the incumbent would probably decide that crushing its competitor was not worth the cost.

It was precisely for this reason that Congress enacted the uniform rate requirement in Section 623(d) of the Communications Act, 47 U.S.C. § 521(d), as part of the Cable Television Consumer Protection and Competition Act of 1992. According to the FCC, the purpose of Section 623(d) was "'to prevent cable operators from having different rate structures in different parts of one cable franchise ... [and] to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily.'"

In the Telecommunications Act of 1996, however, acting on the assumption that the new Act would rapidly bring meaningful competition to the cable industry, Congress amended uniform rate requirement in Section 623(d) to add the following "effective competition" exception:

This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

While an "effective competition" exception may sound reasonable in theory, the FCC has interpreted "effective competition" in ways that render that term all but useless in identifying markets in which true competition can fairly be said to exist. To the contrary, the FCC's interpretations have opened the door to precisely the kinds of anticompetitive behavior that Congress sought to prevent by enacting the uniform rate provision.

Specifically, in Section 623(l) of the Telecommunications Act, 47 U.S.C. §543(l), Congress specified four criteria for determining where "effective competition" exists:

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

While the FCC's implementing regulations in 47 CFR 76.905(b) largely mirror the statutory definitions of "effective competition," the Commission's interpretations of these definitions have essentially gutted them.

As NATOA explained in its comments in the FCC's pending proceeding on rate regulation, the FCC's decisions applying 47 U.S.C. § 543(l) and 47 CFR § 76.905(b) are flawed in several respects. For one thing, two or more cable operators often have overlapping franchises to serve an entire franchising area, but instead of overbuilding and competing with each other, they merely divide the market into non-competitive zones. Even though no subscriber has an actual choice between competing cable operators, the FCC has typically found that "effective competition" exists in these situations because the cable operators might compete with each other some day.

Similarly flawed is the FCC's growing practice of determining "effective competition" solely on the basis of competition from Direct Broadcast Satellite (DBS) providers. Not only are such determinations fraught with evidentiary problems, but even assuming that competition from DBS providers can be established in a particular case, there is no evidence that competition from DBS providers exerts any downward pressure on cable rates. To the contrary, as NATOA's comments point out, "the notion that DBS 'competition' alone suffices to keep rates reasonable flies in the face of the Commission's own finding that 'the presence of effective competition due to DBS overbuild status has no significant effect on cable rates.' The fact is that DBS 'competition' is not keeping rates down, no matter how much the cable industry may fear it. Thus, to depend on DBS is to abandon the Commission's responsibility under the law to protect subscribers from unreasonable rates."

In its early cases involving the DBS test, the FCC appears to have been focusing on the prospect of rate increases by the incumbent. Now, however, the DBS test - and the FCC's precedents on it - have come into play in cases in which the incumbent's main purpose is to offer targeted discounts to thwart competition. A good example is the FCC's recent decision involving Arcadia, CA. In that case, overbuilder Altrio Communications alleged

[I]n November 2001, immediately before Altrio began its service launch and advertising campaign, Adelphia's rates were $33.33 for analog expanded basic service, and an additional $10.00 for digital expanded basic service and $39.99 for cable modem service. In addition, Adelphia offered expanded basic service at $19.95 per month, as well as cable modem service for $19.95 for the first three months of service, as a special promotion to new customers. Altrio indicates that after the launch of its service in December 2001, Adelphia offered an "extraordinary deal" to its existing customers for one year in which Adelphia increased its analog channels by twelve (57-69 channels), its digital channels by 81 (8-89 channels), dropped its rates to $19.95 for analog expanded basic service, charged only an additional $5.88 for digital expanded basic, and offered cable modem service for $19.95. Altrio also asserts that Adelphia customer service representatives engaged in "minute-by-minute" changes in its offers and short-term price cuts to retain existing customers contemplating a switch to Altrio, and to attract new customers.

Altrio Communications at 3. On their faces, these discriminatory rates plainly violated Section 623(d). Shortly after Altrio filed its complaint, however, Adelphia petitioned the FCC to find that it was subject to effective competition in Arcadia as of October 1, 2001, because two DBS providers, EchoStar and DirectTV, offered service in portions of the city. Id. at 5. The FCC agreed and dismissed Altrio's complaint. Id. at 6.

The FCC's interpretation of the fourth statutory criterion is also seriously defective. When Congress fashioned the so-called "LEC test" in 1996, it intended the test to apply to the Bells and other major incumbent local exchange carriers, which Congress expected to become major and ubiquitous players in the cable industry. The FCC, however, has applied the LEC test indiscriminately to competitive local exchange carriers, even to those with as little as 15% current market share and little, if any, possibility of building out the rest of their systems for up to 5½ years. To make matters worse, in the absence of a homes-passed or actual subscribership standard under the LEC test, as there is under the other tests in Section 623(l), the FCC has found that "effective competition" can be found to exist as long as the LEC is planning to provide cable TV service in an area overlapping the incumbent's territory. In short, under the FCC's interpretation of the LEC test, "effective competition" can be found even where the competitor has a minimal number of subscribers and where the vast majority of customers in a given area have no competitive alternative at all.

So predictable have FCC rulings of "effective competition" become under the LEC Test, that some MSO's have not even bothered to file applications for such rulings before introducing discriminatory rate discounts. Like Adelphia in Arcadia, CA, Time Warner filed applications for effective competition determinations for Austin, San Marcos, and San Antonio, TX, only after private-sector overbuilder Grande Communications file a complaint alleging rate discrimination. At the time of this writing, Time Warner's effective competition petition is still pending at the FCC.

In summary, the FCC's interpretations of 47 U.S.C. § 543(l) and 47 CFR § 76.905(b) allow for "effective competition" rulings where meaningful competition does not exist. Far from identifying the markets in which competition has taken hold, the FCC's interpretations have perversely been transformed into vehicles that serve to defeat Congress's pro-competitive goals.

C. Denial of Video Programming and Other Critical Content

1. Video programming

In the Cable Act of 1992, Congress banned unfair and anticompetitive restrictions on access to cable programming, including certain exclusive contracts, and required satellite-based distributors in which MSOs had attributable interests to make cable programming available to competitors of the MSOs on a non-discriminatory basis. As the FCC has recently observed, Congress included these programming access provisions in 1992 Act because it considered access to programming to be "critical to competitive survival." "Congress believed it unlikely that new market entrants could compete effectively unless they could gain access to vertically integrated, satellite delivered programming," and "incumbent providers had both the incentive and the ability to deny [access] to new competitors."

Before discussing the strengths and weaknesses of the current programming access laws and regulations, it is useful to examine the state of vertical integration in the cable industry. "Vertical integration" in this context means that one or more MSOs hold a significant ownership interest in a video programming distributor. Of the 308 satellite-delivered national programming networks existing in 2002, 92 (approximately 30 percent) were vertically integrated with at least one cable MSO. Ninth Annual Video Competition Report at 134. Four of the top six cable MSOs held ownership interests in programming networks, and at least one of these MSOs had an interest in 79 of these 92 networks. Id. at 135. In terms of subscribership, eight of the top 20 video programming networks were vertically integrated with a cable MSO in 1992. Id. at 136. Furthermore, of the top 50 programming networks, only four were not affiliated with a cable company - C SPAN, C SPAN2, WGN, and the Weather Channel. Of these four, MSOs provided 95% of the funding for C SPAN and C-SPAN2. Ninth Annual Video Competition Report at 136 n. 451. Thus, vertical integration and other potential sources of MSO influence over video programming distributors is a major fact of life in the cable industry.

Against this backdrop of extensive vertical integration and control, the statutory requirements and FCC rules on programming access fall into three categories. First, Section 628(b) of the Communications Act, 47 U.S.C. § 528(b), sets forth a general prohibition on unfair practices by vertically integrated cable operators and satellite-delivered programming vendors. Second, Section 628(c) of the Communications Act, 47 U.S.C. § 528(c), prohibits vertically integrated cable operators and programming vendors from engaging in certain specific unfair practices. These practices include exertion of undue or improper influence on the programming vendor's prices, terms and conditions, and discrimination in establishing prices, terms or conditions (subject to several exceptions).

Third, Sections 628(c)(2)(C) and (D) of the Communications Act, 47 U.S.C. §§ 528(c)(2)(C) and (D), prohibit vertically integrated cable operators and programming vendors from entering into, or renewing, exclusive contracts under most circumstances. This prohibition was to expire on October 5, 2002, unless the FCC affirmatively determined that extending it by up to five years was necessary and in the public interest. In June 2002, following an extensive notice-and-comment proceeding, the FCC did so, finding that:

It is evident that competition in the MVPD market has increased in some respects since 1992. We are not persuaded by the arguments presented by cable MSOs, however, that market conditions have changed so fundamentally, and competition in the distribution of video programming is now so robust, that vertically integrated programmers no longer have the incentive to favor affiliated cable operators such that, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected.

Exclusive Contract Report at 65.

Significantly, the FCC declined to use this opportunity to close loopholes in its exclusive contracts rules, particularly the failure of the rules to bar exclusive contracts involving video programming delivered terrestrially by fiber optic cable. The FCC was well aware of the significance of this gap: "We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could have an impact on the ability of alternative MVPDs to compete in the video marketplace." The FCC also recognized that vertically integrated entities "may have an incentive to shift regional sports networks from satellite to terrestrial distribution and thereby avoid the ambit of program access rules." Furthermore, the FCC was aware that increased "clustering" in the cable industry could exacerbate the anticompetitive effects of terrestrially-delivered video programming.

[I]t is likely that cable systems in a large cluster will be linked through a fiber optic network which would enable operators to offer telecommunications services as well as a cost-efficient means of delivering programming to its clustered systems. However, if MSOs have an ownership interest in programming, fiber optic networks may give them an added incentive to 'migrate' programming from satellite delivery to terrestrial (fiber optic) delivery because only satellite-delivered programming is subject to the program access rules. Therefore . . . a vertically integrated incumbent may be able to prevent competitors from gaining access to certain programming because it is terrestrially delivered.

Nevertheless, the FCC declined to address terrestrially-delivered programming in its Exclusive Contracts Report, concluding that it lacks statutory authority to extend its exclusive contracts rules beyond satellite-delivered programming:

The Commission has noted that terrestrial distribution of programming could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market. Nonetheless, the Commission has concluded that the language of Section 628(c) expressly applies to "satellite cable programming and satellite broadcast programming," and that terrestrially delivered programming is "outside of the direct coverage of Section 628(c)." We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion. The Senate version of the legislation that became Section 628 would have applied the program access provisions to all "national and regional cable programmers who are affiliated with cable operators." The House version, by contrast, expressly limited the provisions to "satellite cable programming vendor[s] affiliated with a cable operator." The Conference agreement adopted the House version with amendments. Given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.

Exclusive Contracts Report at 73 (footnotes omitted).

Later in 2002, the FCC returned to these and other programming-access concerns during its review of the AT&T/Comcast merger. Once again, it decided not to act:

With respect to nationally distributed programming, the record contains little evidence that the program access rules will be insufficient to ensure that competing MVPDs have access to important programming that is affiliated with a cable operator. To the extent that affiliated national programming is delivered via satellite, it is covered by our program access rules. Nothing in the record suggests that the merger would affect the cost of transmitting affiliated national programming over terrestrial infrastructure and thereby make it more cost-effective to deliver such programming in that manner..... [W]e cannot conclude that the merger will harm the public interest with respect to exclusive distribution of affiliated, satellite-delivered national programming.

With regard to clustering - which would be a particularly significant issue in the context of the AT&T Comcast merger - the FCC concluded, "To the extent that clustering raises concerns about a cable operator's ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide .... The appropriate forum for consideration of this issue, therefore, is a rulemaking of general applicability." In fact, the FCC maintained, it had already initiated such a rulemaking proceeding "to establish limits on cable operators' horizontal reach pursuant to § 613 of the Communications Act, which directs the Commission to establish such limits to prevent cable operators, because of their subscriber reach, from unfairly impeding the flow of programming to consumers."

The application of the program access rules to terrestrially-delivered programming is likely to be increasingly necessary to accomplish the objectives of the program access statute. As the program access statute itself only concerns "satellite-delivered programming," however, it appears that Congressional action may be required to effect such a change.

b. Other forms of content

As consumers come to expect cable operators to provide new enhanced products and services, the risk grows that MSOs will be able to gain advantages over nascent competitors by blocking their access to such new enhanced products and services. This has already begun to occur in the context of interactive television services (ITV). One such service is video-on-demand (VOD).

At the time of the AT&T/Comcast merger, Comcast possessed an 11 percent ownership interest, and AT&T a 44 percent interest, in iNDEMAND, a VOD service provider. According to the Consumer Federation of America, Comcast's use of exclusive contracts and discriminatory conduct has allowed Comcast to make "substantial inroads" with content suppliers. AT&T/Comcast Approval Order at 161. Similarly, RCN claimed that Comcast's financial interest in Worldgate's TV Gateway product had enabled Comcast to block RCN's access to that product.

Id. Elsewhere, WideOpenWest had reported to the FCC that it could not obtain access to iNDEMAND because of an exclusive contract between it and an MSO, and Everest Connections had reported that, for the same reason, it could not obtain access to iNDEMAND and two other VOD services, Diva and Concurrent.

The FCC declined to address the issue of competitive access to VOD in the context of the AT&T/Comcast merger, stating that the merger "will not enhance or create incentive to impede technological developments in the emerging ITV market" and that "the merged entity would not serve a large enough proportion of MVPD subscribers to close out competitors through exclusive contracts." Id. at 165. Previously, however, in a Notice of Inquiry (NOI) focusing specifically on the implications of vertical integration in ITV services, the FCC had solicited comments on "whether cable operators should be prohibited from discriminating among ITV service providers." In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Dkt. No. 01-7, Notice of Inquiry, FCC 01-15 (rel. January 18, 2001) at 3. That proceeding is still open.

VOD is just beginning to take hold. By 2005, VOD revenues are projected to range between $278 million and $3 billion. Ninth Video Competition Order at 39. If anticompetitive practices in the ITV area are to be prevented, the time to do so is now.

D. Blocking Access to Multiple Dwelling Units

An overbuilder can enter a community only if it has a reasonable prospect of meeting substantial market penetration targets. That would be difficult, if not impossible, to do if the incumbent could shut the overbuilder out of a substantial portion of the market. Tying up multiple dwelling units (MDUs) in exclusive long-term contracts is yet another way that MSOs have thwarted competition from overbuilders.

For example, in many communities in North Carolina, including Charlotte and Raleigh, MDUs comprise over 30 percent of the cable subscriber market. Upon learning that Carolina Broadband intended to overbuild the area, the incumbent cable operator, Time Warner, mounted an aggressive campaign to secure long-term, exclusive contracts with the owners of the MDUs that Carolina Broadband sought to serve. Among other things, Time Warner heavy-handedly threatened to disconnect cable service if the owners of the MDUs did not agree to sign exclusive agreements of five or more years. According to the FCC, Time Warner obtained long-term commitments affecting approximately 80 percent of the MDU units in Charlotte, with "many of these agreements taking place after Carolina Broadband announced its intent to serve the area." Time Warner's tactics proved to be very effective: without access to nearly one-third of its potential subscribers, Carolina Broadband's overbuild efforts ground to a halt.

The FCC raised concerns about exclusive cable contracts in MDUs in a rulemaking initiated in 1997. After allowing the rulemaking to languish for nearly six years, the FCC concluded on January 29, 2003, that the record before it did not justify a ban or a time limit on such contracts:

In sum, we find that the record does not support a prohibition on exclusive contracts for video services in MDUs, nor a time limit, in the nature of a cap, for such contracts. The parties have identified both pro-competitive and anti-competitive aspects of exclusive contracts. We cannot state, based on the record, that exclusive contracts are predominantly anti-competitive. With respect to capping such contracts, there appears to be little agreement over the length of term. Again, based on the record, we cannot discern the "correct" length. We note that competition in the MDU market is improving, even with the existence of exclusive contracts. Accordingly, we decline to intervene. Because we are not banning or capping exclusive contracts, we also decline to address arguments pertaining to the Commission's authority to do so.

Having so recently decided this issue, it is unlikely that the FCC would want to revisit it anytime soon - at least in isolation from other anticompetitive activities. Carolina Broadband's experience suggests, however, that the information that the FCC obtained when it launched its inquiry on MDUs years ago may not fully reflect current realities.

E. Other Anticompetitive Practices

MSO's have also engaged in a host of other anticompetitive practices. These include, but are by no means limited to, the following activities:

? Refusing to deal with suppliers and contractors that provide services to competitors

? Hiring away key employees of competitors

? Using litigation to prevent or delay competition

? Refusing to carry advertising of overbuilders

? Interfering with local franchise processes

? Flooding local media with misinformation about public communications initiatives

? Lobbying for anticompetitive state laws

Combined with the other anticompetitive practices discussed above, these tactics seriously undermine the pro-competitive goals that Congress has expressed for the cable industry for the last two decades.

Conclusion

As shown above, anticompetitive conduct by MSOs takes many forms and shapes. Addressing such misconduct on a case-by-case basis before the FCC, the DOJ, the FTC, state agencies or the courts would be prohibitively burdensome, time-consuming and expensive for NATOA and its allies. This would also be true of an issue-by-issue approach before the FCC or Congress. Furthermore, partial successes that left major areas of anticompetitive conduct intact would ultimately do little to create a truly competitive environment.

In short, anticompetitive behavior by MSOs is a multi-headed monster. In the Cable Act of 1992, Congress lopped off the anticompetitive heads that were known at the time by barring targeted rate discrimination, promoting access to home wiring and satellite-delivered video programming, and prohibiting recognized forms of unfair competition. Like Hydra of Greek mythology, however, the monster has grown new heads to replace the ones that Congress severed in 1992. Legend has it that Hercules ultimately defeated Hydra by cauterizing its wounds with a hot iron as he chopped away.

[The remainder of this report consisting of recommendations, legal advice and strategy has been deleted by NATOA.]

SPECIFIC EXAMPLES OF ANTICOMPETITIVE CONDUCT
BY INCUMBENT NATIONAL CABLE OPERATORS

Adelphia Communications Corporation

Arcadia, California

Competitive Service Provider: Altrio Communications

? In November 2001, immediately before Altrio began its service launch, Adelphia's rates were $33.33 for analog expanded basic service, an additional $10 for digital expanded basic service, and $39.99 for cable modem service. After Altrio's launch, Adelphia increased its analog channels by twelve, its digital channels by 81, dropped its rates to $19.95 for analog expanded basic service, charged only an additional $5.88 for digital expanded basic, and offered cable modem service for $19.95.
? In a complaint to the FCC, Altrio alleged that Adelphia sought to eliminate Altrio as a competitor, and violated the geographic rate uniformity requirement. Complaint of Altrio Communications Inc., Against Adelphia Communications Corporation for Discriminatory and Predatory Pricing of Cable Service, CSR-5862-R (filed March 1, 2002).
? Adelphia responded to the complaint, arguing that it is subject to local exchange carrier (LEC) effective competition, and therefore exempt from the uniform pricing requirement, because Altrio provides local exchange telephone service in Arcadia. Adelphia filed an unopposed petition for effective competition, and the FCC found (based on the competing provider test) that Adelphia was subject to effective competition as of October 1, 2001.
? Altrio's petition was dismissed by the FCC because Adelphia's effective competition status made the uniform rate rules inapplicable.

Charter Communications Corporation

Montgomery, Alabama

Competitive Service Provider: Knology

? Charter acquired the incumbent cable system in 2001 from AT&T Broadband, immediately lowered the price of its digital tier, and offered Knology customers a $300 cash bounty to switch to Charter.
? During the summer of 2001, Charter began to offer a "digital complete" service for less than $23 per month, including all analog expanded basic services, 50 channels available only on the digital tier, and 50 channels of digital music.
? Charter forgives past unpaid cable bills by customers who switch from Knology.
? In March, 2002, Charter offered an expanded basic service at a rate of $13.42 per month for 12 months, with high speed Internet access for an additional $19.95, for 3 months.
? Knology contends that Charter is taking a significant loss on each new customer, but will be able to recoup its losses once it has driven its competitors out of the market. Knology filed a complaint with the FCC, but the FCC stated: "it is not clear that we have specific statutory authority to address these kinds of problems directly."

Realtown, Alabama

Competitive Service Provider: Com-Link

? During the summer of 2001, Charter paid a $300 cash bounty to each Com-Link customer who switches to Charter.

Scottsboro, Alabama

Competitive Service Provider: Scottsboro Electric Power Board (Scottsboro)

The Scottsboro Electric Power Board began construction of a municipally owned cable television system in Scottsboro because of widespread customer dissatisfaction with the incumbent, Falcon Cablevision. In late 1999, Charter acquired Falcon's operation in Scottsboro, and began a course of predatory conduct designed to terminate Scottsboro's efforts to compete and survive in the market.

? Charter's rate for Basic and Expanded Basic cable service is $0, for anyone who has received cable service from Scottsboro. Nearby, Charter charges customers up to $45 per month for Basic and Expanded Basic.
? In April 2000, Charter offered digital service with premium channels to Scottsboro customers for $19.95 per month for 12 months. Thereafter, Charter allowed a number of customers to renew at this rate. These rates are available only to Scottsboro customers, and not available to all potential subscribers in Scottsboro.
? Charter offered an "amnesty program" to forgive prior unpaid bills.
? Charter offered a $200 cash bounty to each Scottsboro customer who switches to Charter, with an additional $200 if subscribers take its Internet service.
? Charter offers to cut rates by $20 per month for six months "only to people who are not current customers of Charter Communications." In the coupons it distributed, Charter predicted that "[r]esponse to this offer will be enormous."
? Charter reportedly is losing between $6 and $16 per month for every customer, on

programming costs alone.
? Scottsboro filed comments about Charter's anticompetitive conduct in the FCC's annual docket reviewing the status of competition in the cable market, but FCC took no action because "it is not clear that we have specific statutory authority to address these kinds of problems directly."

Troy, Alabama

Competitive Service Provider: Troy Cable

? Charter offers analog expanded service for $15.99 per month, and a digital package for $24.95.
? Charter offers a $200 cash bounty to each Troy customer who switches to Charter.

Newnan, Georgia

Competitive Service Provider: Newnan Utilities

? Charter offers analog expanded basic services for $19.95 per month, and a digital package for $24.95.
? Charter offers a $300 cash bounty to each Newman Utilities customer who switches to Charter.
? Starting April, 2002, Charter began telephone solicitations targeted at NU customers offering cable services at half price for one year.
? Charter offers to cut rates by $20 per month for six months "only to people who are not current customers of Charter Communications." In the coupons it distributed, Charter predicted that "[r]esponse to this offer will be enormous."

West Point, Georgia

Competitive Service Provider: Knology

? Charter offers analog expanded basic service for $19.95 per month, and a digital package for $24.95. Its rate card for analog expanded basic service is $35.95.
? Charter pays a $200 cash bounty to each Knology customer who switches to Charter. The offer requires a commitment to remain with Charter for 12 months, and assesses a penalty of $25 per month if the commitment is not honored.

Coldwater, Michigan

Competitive Service Provider: Coldwater Board of Public Utilities

? Charter offers analog expanded basic service for $19.95 per month.
? Charter pays a $100 cash bounty to each CBPU customer who switches to Charter.

Marshall, Minnesota

Competitive Service Provider: McLeod USA

? Charter offers "Digital MVP" service for $19.95, including expanded basic service, digital service, and six premium movie channels.
? Offer requires that the customer remain with Charter through the end of 2001, and charges a $10 per month penalty if service is cancelled.

St. Cloud, Minnesota

Competitive Service Provider: Seren Innovations/Astound Broadband

? Charter offers expanded basic and digital service with 34 premium channels for $39.95 per month, and for as low as $16.67 for expanded basic service over six months. The rate card for this level of service is $59.95.
? Charter offers the above service plus high speed Internet access for $49.95. The rate card for this service is $89.95.
? Charter pays a $100 cash bounty to each Seren/Astound customer who switches to Charter.

Winona, Minnesota

Competitive Service Provider: Hiawatha Broadband

? Charter offers "Digital MVP" service for $29.95. Service includes expanded basic service, digital service, and six premium movie channels.
? $100, $150, and $200 credits are offered to Hiawatha Broadband customers who switch to Charter.

Ashland, Oregon

Competitive Service Provider: Ashland Fiber Network

? Charter offers free TV service to Resident Apartment Managers in exchange for leads when new tenants move in.
? Charter offers switch and win-back incentives, including a free turkey at Thanksgiving; free pay-per-view coupons, popcorn and soda; and a "$200 cash offer to switch back from AFN"
? AFN does not provide any free services; all customers pay one consistent rate with no special deals.
? Southern Oregon University sought bids for residence hall cable television services in the summer of 2001. Charter was providing cable services for the dorms at that time for approximately $67,000 annually. AFN submitted a bid for the services of approximately $40,000 - reflecting AFN's cost with essentially no markup. Charter bid $21,287.70 and was awarded the contract, which was signed in September, 2001. Charter failed to break even on the deal.

Fayetteville, Tennessee

Competitive Service Provider: Fayetteville Electric System

? Charter offers expanded basic analog service for $19.95 per month, and "Digital Complete" service for $29.95 and $39.95.
? Charter offers $200 cash payments to FES customers who switch to Charter.
? Starting April 2002, Charter offers FES customers $200 credits "for disconnecting existing cable service from your current provider."
? Charter offers expanded basic analog service for $23.66 - guaranteed "through May 31, 2004" - to "active Non-Charter cable customers in Charter wired overbuilt areas." The offer requires customer signature and purports to assess a fine of $19.95 per month of service is cancelled during the term of the agreement.

Columbia, Tennessee

Competitive Service Provider: Columbia Power & Water Systems

? Columbia Power & Water Systems is several months away from launching their cable system, but Charter has begun offering apartment complex owners $150 per unit for exclusive agreements.

Parkersburg, West Virginia

Competitive Service Provider: Community Antenna Services

? Charter improperly offered discounted rates to potential customers of CAS who attempted to cancel Charter service.
? Discriminatorily offered a total of 8 aggressive, below-cost buy-back plans targeted at CAS customers, some by door-to-door salesmen. Only customers who have CAS service available and either leave Charter or threaten to leave Charter for CAS are offered the plans.
? Charter offers expanded basic analog service for $24.95 per month, and adds the digital tier for another $5.00.
? Charter offers a $200 cash payment to CAS customers who switch to Charter.
? CAS filed a Complaint before the Public Service Commission of West Virginia (Case No. 01-0646-CTV-C). The ALJ made findings against Charter, entered August 19, 2002, as follows:
o Charter failed to rebut presumption that there is no "effective competition" (CFR § 76.907(b)) in any of the franchise areas at issue. PSC made determination there was none.
o Charter ordered to "cease and desist engaging in rate discrimination"
o Charter violated WV PSC rules regarding notice of rate changes, requiring cable operators to give the PSC a 60-day notice of any change in cable service rates.
? CAS is continuing to pursue civil litigation to recover damages.

Chibardun, Wisconsin

Competitive Service Provider: Chibardun Telephone Cooperative

? Charter offers expanded basic analog service for $19.95 and $24.95.
? Charter offers $200 and $300 cash payments to CTC customers who switch to Charter.

AT& T and Comcast Corporation

San Francisco, California

Competitive Service Provider: Seren Innovations

? Seren Innovations complained to the FCC alleging that AT&T colluded with partners to deny Seren access to the Bay TV programming service, in violation of the FCC's program access rules.

Augusta, Georgia

Competitive Service Provider: Knology

? Comcast offers expanded basic analog service for $18.95 per month. The standard rate is $33.25.
? Comcast offers a digital package with expanded basic, digital tier, 2 premium channels and high speed Internet access for $49.95 per month. The standard rate is $109.70.

Braintree, Massachusetts

Competitive Service Provider: Braintree Electric Light Department

? The Braintree Electric Light Department (BELD) complains that it has been unable to secure a distribution agreement with the New England Cable News channel, which is affiliated with AT&T, because the service has been moved to terrestrial delivery and falls outside of the FCC's program access rules.

Michigan & Illinois (multiple communities)

Competitive Service Provider: WideOpenWest

? Comcast offers selective, unpublished, predatory discounts (50% off for 12 months), targeted to Comcast customers who express interest in switching to WideOpenWest.
? "In some cases, neighborhoods that are about to be overbuilt (by WideOpenWest) are telemarketed, and subscribers are asked to sign a multiple-month commitment in exchange for a deep discount." (Multichannel News, April 8, 2002).
? As of April, 2002, Comcast targeted telephone solicitations to WideOpenWest customers, offering expanded basic analog service for $18.00 per month for six months, with free installation, if WideOpenWest customers return to Comcast.
? Comcast offers expanded basic analog service for $21.95 per month. The standard rate is $33.95.
? Comcast offers a digital package with expanded basic and the digital tier for $34.95. The standard rate is $50.95.
? WideOpenWest filed objections to consent of Comcast AT&T Broadband merger, and sent a letter to 42 local franchising authorities in Michigan and Illinois urging them to condition consent to the merger in a way that would preserve the benefits of competition.
? "Comcast will argue that these selectively targeted discriminatory rates are merely aimed at "meeting the competition." It's far more evident the aim is ending any competition. Pricing plans

are supposed to be available on a non-discriminatory basis. These Comcast offers are not advertised to all current and potential Comcast customers; rather, this discriminatory and anti-competitive pricing scheme is being administered secretively and selectively. It is communicated only to those individuals living in areas serviced by WideOpenWest who selected, or wish to switch to, WideOpenWest. This discriminatory marketing strategy has a clear strategic intent - to ultimately eliminate WideOpenWest's competitive presence, to the eventual and long-lasting harm to all residents." [Mark Haverkate, President & CEO, WideOpenWest, in a March 22, 2002 letter to 42 local franchise authorities in Michigan and Illinois urging that consent to the Comcast AT&T Broadband merger be conditioned in a way that would preserve the benefits of competition.]
? WideOpenWest reports that Comcast has frequently disconnected WideOpenWest subscribers, and provided substantial misinformation to customers wishing to switch.

Philadelphia & New York City

Competitive Service Provider: RCN

? Lack of access to regional sports programming has made it difficult for RCN to compete with Comcast's cable offerings. Specifically, RCN argues that Comcast has imposed unfair terms and conditions on access to its SportsNet regional and local sports programming, and has purposefully migrated to a terrestrial delivery system in avoidance of the FCC's program access rules.

South Dakota (Yankton and other communities)

Competitive Service Provider: McLeod USA

? Comcast offers all services to McLeod customers - analog, digital, high speed Internet access - free for three months, and then 50 percent off for three more months.

Various Communities

Competitive Service Provider: RCN

? Comcast uses targeted marketing campaigns, in which discounts are offered only to customers of Starpower, RCN's affiliate, or residents of areas in which Starpower competes or has begun to deploy services. Comcast offers bonuses to sales representatives who convert RCN subscribers to Comcast.
? Discounts are offered to other residents only if they know about and specifically request the offer.
? RCN alleges that Comcast has used the local franchise process to hinder competition in its local franchise areas.
? Starpower has encountered several buildings in which Comcast and its predecessors have received exclusive rights to serve the buildings and it tenants.
? RCN alleges that Comcast and its predecessors have attempted to prevent contractors from doing business with RCN by requiring them to sign non-compete clauses and by threatening with reprisals any contractors found working for RCN.

Time Warner Cable

Kansas City, Missouri

Competitive Service Provider: Everest Connections

? The incumbent, Kansas City Cable Partners (jointly owned by Time Warner and AT&T) offers steeply discounted pricing for persons in new Everest areas, not generally offered in places where Everest has not started marketing services.
? Time Warner offers expanded basic analog service for $21.45 per month, and offers a "digital deluxe" package with expanded basic, digital tier, and three premium channels for $39.95 per month.
? Time Warner offers a $200 cash payment to Everest customers who switch. Additional payments are made for customer testimonials in favor of Time Warner. At the same time, Time Warner raises rates for other subscribers in the metro area by $2.40.
? Time Warner installers go door-to-door to Everest customers offering to switch service and give three months of free service.
? Time Warner negotiates long-term contracts for exclusive access to MDUs, before wiring the buildings, and in some cases for the life of the Time Warner franchise plus any renewals.
? Time Warner refuses to make local sports channel, Metro Sports, available to Everest.
? Everest filed a complaint with the FCC against Time Warner for violating 47 CFR 76.984 (filed February, 2002, alleging predatory pricing).

Texas (Austin, San Antonio, and San Marcos)

Competitive Service Provider: Grande Communications

? In a potential violation of the uniform rate provisions of the Cable Act and without a determination of "effective competition" in the area, Time Warner engaged in improper "win-back" practices and provided improper discount cable packages, not made openly to all cable customers. Their discounted pricing scheme is publicized only to those individuals living in areas service by Grande who have switched services from Time Warner.
? Time Warner offers a digital package with expanded basic and digital tier service for $29.95 per month, a discount of $16.68 per month, or $200 per year. Time Warner offers the same package with HBO and Showtime for $46.94. The rate card is $74.52 for this service. These discounts follow Time Warner rate increases of $2 in August 2001 and again in January 2002, and are not available to all Time Warner customers.
? Their discounted pricing scheme "is not a true promotion. There have been neither advertisements in the local media alerting the public to the discount not any fliers in Time Warner's monthly billing statements describing the deal. In fact, customers who have contacted Time Warner directly have been unable to confirm not only the plan terms, but that the plan exists at all. The pricing scheme is being administered under the table. It is publicized only to those individuals living in areas serviced by Grande who have switched service from Time Warner." (Comments from City of Austin to the Federal Communications Commission, February 1, 2002).
? Grande Communications filed a Complaint with the FCC alleging that Time Warner engaged in anticompetitive practices, violating FCC regulations.

? Time Warner filed with the FCC Petitions for Effective Competition Status in Austin, San Marcos, and San Antonio (CSR-5701-E, filed May 4, 2001), even though its rivals serve only a fraction of the households. Austin, San Antonio, and Grande Communications filed opposition comments with the FCC in response, with the City of Austin citing Time Warner's practices with regard to Grande as an example of the competitive landscape that would result if Time Warner was granted effective competition status. The City argued that the aggressive, and possibly illegal, pricing was "just one reason why the FCC should continue to protect Grande until they grow in size and resources." Time Warner based its petition on a rule that allows cable companies to seek "effective competition" status if a local-service phone company begins offering video programming in a market. The FCC has yet to rule on the petition.

North Carolina (Charlotte, Raleigh, and other communities)

Competitive Service Provider: Carolina Broadband

? Time Warner aggressively secured long-term exclusive access contracts with MDU' - which comprise 30 percent of the market - before Carolina Broadband began providing service. Time Warner threatened to disconnect cable services if MDU management did not agree to sign 5+ year agreements.
? Carolina Broadband is on "hiatus" due to effect of anticompetitive conduct (lack of access to MDU's, and discriminatory pole access fees and policies).

Columbus, Ohio

Competitive Service Provider: WideOpenWest

? Time Warner offers a 50 percent reduction in price of all cable services, but only for current customers of competitor.
? Time Warner customer service representatives have separate offer sheets for callers who identify themselves as WideOpenWest customers.
? Time Warner offers large discounts on Internet/digital data services to WideOpenWest customers (published rates of $49.95 and $14.95 per month for Internet and digital cable, respectively, reduced to $25 for both services for WideOpenWest customers only).
? Time Warner representatives engage in scare tactics (e.g., telling WideOpenWest customers that the transfer of systems to WideOpenWest will cause service disruptions, that WideOpenWest will be going out of business soon, etc.)

Mediacom Corporation

Algona, Iowa

Competitive Service Provider: Algona Municipal Utilities

? Mediacom telemarketers target AMU customers with offers of expanded basic cable service for $19.90 per month, and expanded basic digital cable service for $24.95 per month, with prices

guaranteed for one year.
? While Mediacom's rates elsewhere continue to soar, in Algona they have fallen and certain citizens are receiving "all but free" service from Mediacom. AMU reports that Time Warner has waived "past due" balances and extended deeply discounted rate programs via coupons that are not made generally available to other subscribers.

Armstrong, Iowa

Competitive Service Provider: Independent Networks

? Mediacom targets competitor's customers in door-to-door campaign with offers of expanded basic digital cable service for $12.50 per month, with "Amnesty on Back Balances."
? Prices for digital service, which the competitor does not provide, are not discounted.

Emmetsburg, Iowa

Competitive Service Provider: n/a

? The Emmetsburg City Council questioned a Mediacom government relations official about why pricing in nearby towns (Spencer, Armstrong, and Laurens) was much lower than rates for Emmetsburg. Mediacom's representative stated that Mediacom's prices were low in areas where there is competition, and will remain so until the competition is driven out (after which Mediacom will raise rates "to the same place as everywhere else.") This statement evidences the intention (running competitive municipal overbuilders out of business), and the strategy for doing so (lowering prices to an economically irrational level).

Harlan, Iowa

Competitive Service Provider: Harlan Municipal Utilities

? Mediacom offers expanded basic digital cable service (plus Starz and Encore movie channels) for $20.99 per month. Modified basic service (30 channels, no movies) is offered for $17.80 per month.

Laurens, Iowa

Competitive Service Provider: Laurens Municipal Communications Utility

? Mediacom offers all cable and Internet access services to new customers at a 50 percent reduction for six months. Expanded basic service is $21.25.

Muscatine, Iowa

Competitive Service Provider: Muscatine Power and Water

? Incumbent offers "digital gold" cable programming package for $25.75 per month for six months, along with three pay-per-view movies.
? Incumbent offers "Switch Back Offer. A $200 value!!"
? In September, 2000, Incumbent expanded basic digital cable service for $19.95 per month, guaranteed for 12 months, for new cable customers in Muscatine only.
? Flyer announcing a promotional offer states: "Keep this Between Us" and "Don't tell your out-of-town friends, but AT&T is offering incredibly low prices for digital cable TV here in Muscatine" (emphasis in original).

Spencer, Iowa

Competitive Service Provider: Spencer Municipal Utilities

? Starting June 2000, Mediacom offered SMU customers expanded basic analog service free for two months, then for $19.95 per month, upon written commitments by customers to continue service for 6 to 12 months. In August 2001, these "contracts" are "automatically extended" for another year, until July 2002. Price compares to Mediacom rate of $36.95 in Des Moines in 2002.
? Digital services are also discounted (e.g., $29.95 for digital service including one multi-screen movie package, including up to 16 movie channels. Regular rate is $51.95, as indicated in a flyer distributed in Armstrong, IA).
? During the winter and spring of 2001-2002, Mediacom targeted SMU customers with offers of
o Amnesty on old unpaid bills if service is resumed with Mediacom,
o All video services free for three months and half price for 3 additional months, and
o Half price Internet access ($20.00 per month) for 6 months.
? Flyers were distributed to SMU homes ("ATTENTION: SMU Subscribers") announcing offers.

Storm Lake, Iowa

Competitive Service Provider: McLeod USA

? Mediacom offers all services to McLeod customers - analog, digital, high speed Internet access - at 50 percent reductions.
? Mediacom sales representatives visit McLeod customers at their homes and urge them to switch service because McLeod is bankrupt and no longer able to provide service. Other Mediacom reps tell McLeod customers that Mediacom is buying McLeod and customers can switch without contacting McLeod.